

High court wrestles with Lindquist's phone records

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Mark Lindquist

Justices from the Washington State Supreme Court dialed up question after question about Pierce County Prosecutor Mark Lindquist's private phone records during oral arguments Thursday in Olympia.

The answers to those questions and the ruling from the high court that will follow could set a wide-ranging precedent regarding the tricky issue of public records on private devices.

Inquiries from the justices generally hinged on two themes: whether public officials can shield records simply by using private devices to create them, and whether governments have the legal authority to prevent such tactics.

The underlying case, *Nissen v. Pierce County*, pits a sheriff's deputy against county government and the prosecutor.

Four years ago, Glenda Nissen filed a records request seeking phone records and text messages from [Lindquist's private phone](#). He provided partial records voluntarily, but redacted some portions, claiming privacy. Records of some text messages were provided, but not their content.

Nissen believes the records will show that Lindquist retaliated against her in the course of a long-running dispute. She contends that the records are public because they relate to public business, noting that Lindquist has acknowledged using his private phone for work purposes. Attorneys for the county and Lindquist say the records aren't public, and that Lindquist voluntarily provided sufficient records in response.

Nissen and her attorneys have asked a judge to conduct a private, in-camera — that is, alone, in chambers — review of Lindquist's records to determine whether any of the redacted material qualifies as a public record.

The county and Lindquist say such a review would violate Lindquist's right to privacy. The county has paid \$282,490 to outside attorneys to defend the case.

The star of the show didn't show up Thursday; Lindquist did not attend the hearing, though his chief of staff, Dawn Farina, sat in the gallery. Nissen, the plaintiff, watched from the audience.

Attorney Michele Earl-Hubbard represented Nissen. Attorney William Crittenden spoke on behalf of the League of Women Voters of Washington.

Former Supreme Court Justice Phil Talmadge spoke for the county and Lindquist. He argued that current law didn't allow an examination of Lindquist's private phone records and text messages.

Talmadge had barely started his opening statement when Justice Steven Gonzales drilled him with a pointed question.

"If government officials wish to avoid exposure to the Public Records Act, they may simply use their private devices for all of their communications? And the communications would be unavailable to the public?"

Talmadge gave a long answer.

"Is that a yes?" Gonzales asked.

"That's a yes," Talmadge said.

What was the remedy? Talmadge said it was up to the Legislature to pass a new law to address it.

Other justices repeated the question with variations. Justice Mary Fairhurst asked whether the record in dispute would be public if Lindquist created it on a public phone. Talmadge said it would.

Justice Debra Stephens asked about the text messages, noting that Lindquist had provided a log, but not the messages themselves. Talmadge replied with a small piece of news:

“We know that Mr. Lindquist deleted the individual texts from his cell phone prior to the receipt of the request,” he said.

The implication: if Lindquist deleted the text messages, only Verizon, the cell phone carrier, could provide them. That would put Pierce County in the position of seeking records from a private company, rather than the prosecutor.

Justice Charles Wiggins framed the issue in terms of paper rather than circuits.

“Let’s change the technology and think about – gasp – a land line instead of a cell phone,” he said.

Wiggins described a small scenario. The prosecutor gets a phone call at home about work. He makes a note, puts it in an envelope and files it in a desk drawer. Would it be a public record?

Talmadge said it was conceivable.

“Your argument seems to go to sort of location,” Wiggins said. “If it’s not at the City-County Building or the county courthouse, but it’s at home, then it’s off limits.”

Talmadge said Lindquist’s phone was still a private device, and the state disclosure laws didn’t cover it.

Chief Justice Barbara Madsen pointed out that Lindquist had “used” the records because he created them — an important nuance in the law defining public records.

Talmadge said the question of Lindquist’s civil rights still mattered; if the county tried to force the prosecutor — or any employee — to give up private records, where was the authority?

“What happens to the right of the public to know what their officials are up to if we in our modern technology age do everything on our private devices?” Madsen asked. “It’s driving a truck through the PRA (Public Records Act.)”

“That’s what the Legislature’s for,” Talmadge said.

Questions of authority dominated the second half of the argument, when the plaintiff’s attorneys, Crittenden and Earl-Hubbard, spoke. Justice Sheryl Gordon McCloud asked whether demanding Lindquist’s records would require a search warrant.

Crittenden said no. He said the county was in a difficult position, hamstrung “by an elected official who doesn’t want to follow the (Public Records) Act.” That didn’t remove the county’s duty to seek the records, he added.

Madsen asked whether Lindquist could challenge the county if ordered to turn over the records. Crittenden said maybe Lindquist could do that — but it didn’t matter because it hadn’t happened.

“How far can you go?” Gonzales asked. “Who gets to look? What’s the standard?”

Crittenden said it wasn’t the plaintiff’s job to define the standard. It was the county’s job to adopt such standards for its employees.

“It’s pretty much an open-court admission that they haven’t done that,” he said.

Earl-Hubbard said “who gets to look?” was the wrong question, and that applying standards of criminal law to workplace issues was inappropriate.

“This is not a law enforcement investigation,” she said. “This is a workplace intrusion. He has what he has conceded are work texts that he placed on his own phone by his own choice. The employer is now authorized to ask the employee for those records.”

McCloud and Stephens both asked for the law that defined that authority.

Earl-Hubbard said the authority was implicit — a condition of employment. Lindquist’s claims of privacy had to be proven, not just claimed.

“It’s the reasonableness of the expectation of privacy,” she said. “We don’t allow officials to come in creating a view of the public records law that drives a truck through it.”

Wiggins asked whether a privilege log — a list of the disputed records that provides rough descriptions and why they might be private — would help the situation. Earl-Hubbard said it might, but a judge would have to see the records to create such a log.

“One of the arguments being made here is it wouldn’t be appropriate for even a judge to get a look at this,” she said. “It’s not a constitutional violation for a judge to do his or her job. These records have never been reviewed by the county or by a judge.”

That point touched on one possible outcome of Thursday’s arguments.

If the high court agrees with Nissen and her attorneys, next steps could include remanding the case to Thurston County Superior Court, where it began, and ordering a judge to conduct an in-camera review.

Talmadge also alluded to that prospect, saying the same privacy arguments brought to the high court would likely reappear in the lower court if the case continues.

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